(3)

No. 85-1530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM E. BROCK, SECRETARY OF LABOR, and ALAN C. McMILLAN, REGIONAL ADMINISTRATOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,

Appellants,

v.

ROADWAY EXPRESS, INC.,

Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

---

BRIEF FOR TEAMSTERS FOR A DEMOCRATIC UNION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Arthur L. Fox II
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for *Amicus Curiae*

July 25, 1986

CASILLAS PRESS INC. - 1717 K ST NW WASHINGTON DC - 223-1220

30 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **Page**

Page

LEGISLATIVE MATERIALS AND RULES

Statutes:

Legislative History

Page

Rules:

OTHER AUTHORITIES:

Page

Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1530

WILLIAM E. BROCK, SECRETARY OF LABOR, and ALAN C. McMILLAN, REGIONAL ADMINISTRATOR, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,

Appellants,

v.

ROADWAY EXPRESS, INC.,

Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

---

BRIEF FOR TEAMSTERS FOR A DEMOCRATIC UNION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

THE INTEREST OF *AMICUS CURIAE*

Teamsters for a Democratic Union ("TDU") is a voluntary unincorporated association of thousands of rank-and-file Teamsters members seeking to reform and democratize their union, and, in so doing, to make it more responsive to their needs. As is true for the International Brotherhood of Teamsters itself, the core of the membership of TDU — and particularly of its predecessor organization, PROD (the Professional Drivers Council for Safety and Health) — is employed in the trucking industry.

One of the significant shortcomings of the Teamsters Union has been its lack of commitment to occupational safety and health in the trucking industry, a matter of concern not only to its members, but also to the general public who are all too often victims in accidents involving unsafe trucks. Although most trucking contracts contain strong safety clauses, many Teamster members have found not only that their union is uninterested in enforcing these provisions, but also that those members who invoke the contractual protections are not supported by the union in the "joint grievance committee" system, which is used instead of neutral arbitration in the Teamsters Union. Moreover, it was not until several years after the formation of PROD that the Teamsters even created a Safety Department and hired a Safety Director.

Thus, a substantial part of TDU's and PROD's efforts have been directed to obtaining government intervention in support of truck safety, particularly the passage of meaningful whistleblower protections. These were ultimately enacted as section 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2305, whose enforcement procedures are subjected to constitutional attack in this case. TDU's members, staff, and counsel all testified at the hearings on the whistleblower protections and worked closely with members of Congress during the legislative process that led to the enactment of the law. *Amicus curiae* files this brief, with the consent of both sides, both to defend the product of its intensive effort, and to justify one of the most important legal protections which its members enjoy on the job.

SUMMARY OF ARGUMENT

The enforcement procedures in section 405 of the Surface Transportation Assistance Act are a constitutional response to an extremely grave problem. Trucking accidents cause a large number of deaths and injuries, not only to the truck drivers themselves, but also to the general public with whom they share the highways. Yet until section 405 was enacted, truck drivers who refused to drive unsafe trucks did not enjoy any legal protection against discharge, and therefore were often unwilling to risk their livelihoods in order to prevent unsafe practices. Congress decided to provide simple and effective procedures to protect such drivers, including preliminary reinstatement orders, in order to recruit them as the front line in preventing safety violations.

Unlike the Solicitor General, TDU does not argue that these preliminary orders satisfy due process because of the quality of the investigations made by the Secretary of Labor before he issues them. Rather, we argue that the due process cases invoked by the court below have no application because the preliminary orders under section 405 are not self-enforcing. If such orders are not voluntarily respected by the employer, the Secretary must obtain a court order to enforce them.

The Secretary's decision to seek judicial enforcement without first holding an evidentiary hearing no more violates due process than the decision of the National Labor Relations Board to seek a preliminary injunction pending an administrative hearing on an unfair labor practice complaint. In such cases, the focus of the judicial inquiry should be whether there are facts which create a reasonable basis for believing that the statute was violated; the procedures used by the Secretary in deciding to seek

preliminary reinstatement simply have no bearing on that issue and hence are not subject to due process challenge.

The alternative suggestion by the court below that the right to preliminary reinstatement is undermined by the fact that a worker's discharge has been upheld by a union-employer grievance committee is also without basis. The fact that a discharge is proper under a collective bargaining agreement has no bearing on the employee's statutory rights. This Court has reached the same conclusion about other worker-protection statutes, and there is no reason why section 405 should be treated any differently.

ARGUMENT

THE PRELIMINARY REINSTATEMENT PROCEDURE IN SECTION 405 IS CONSTITUTIONAL.

A. The Reasons for the Enactment of Section 405.

Before addressing Roadway's due process objections to section 405, it is important to consider the reasons why Congress chose to provide truck drivers with an expeditious reinstatement remedy. The statute was the product of several years of hearings and debates about the problems of truck safety, as it affects both the workers employed in the trucking industry and the general public which must drive on the roads with heavy trucks. Congress was regaled with data about truck safety problems during a series of hearings in 1978 to 1980.[1] Senator

[1] *Truck Safety Act of 1978,* Hearing Before the Senate Committee on Commerce, Science, and Transportation, 95th Cong., 2d Sess., No. 95-132 (1978) ("1978 Safety Hearing"); *Truck Safety Act,* Hearings Before the Senate Committee on Commerce, Science, and Transportation, 96th Cong., 1st Sess., No. 96-55 (1979) ("1979 Safety Hearings"); *Examining Current Conditions in the Trucking Industry and the Possible Necessity for Change in the Manner and Scope of Its Regulations,* Hearings Before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation, 96th Cong., 2d Sess., No., No. 96-46, Part 3 (1980) ("1980 Current Conditions Hearings"); *Commercial Motor Carrier Safety,* Hearing Before the Subcommittee on Surface Transportation of the House Committee on Public Works and Transportation, 96th Cong., 2d Sess., No. 96-57 (1980) ("1980 Safety Hearing").

Charles Percy introduced a truck safety bill, S. 1390, which passed the Senate, 126 Cong. Rec. S1661 (daily ed., February 20, 1980), but was never brought to a vote in the House. The bill's provisions were then incorporated into section 405 of the Surface Transportation Assistance Act of 1982, 128 Cong. Rec. S14018-14019 (daily ed., December 7, 1982), which passed as Pub. L. No. 97-424, 96 Stat. 2157-2158 (1983).

Truck driving is an extremely dangerous profession. Driving long hours, at high speeds, in vehicles weighing up to 80,000 pounds and measuring up to 90 feet in length, would be a high risk occupation for both the driver and other motorists, even if the vehicles were in good condition. The risk is compounded, however, by the fact that the mechanical condition of commercial trucks is often well below par. According to the Bureau of Motor Carrier Safety, in 1980 some 2.5 violations were found for each safety inspection, and one out of every two inspections produced a violation serious enough to require that the vehicle be taken out of service. BMCS, *1980/81 Roadside Vehicle Inspection Report* 17 (1982). Therefore, it is not surprising that, although coal mining has been considered the most dangerous job in the United States, the transportation industry produced almost twice as many fatalities in

1980.[2] Indeed, in that year trucking and warehousing produced more per capita injuries leading to the loss of workdays than any industry except the manufacturing of lumber and wood products. Bureau of Labor Statistics, *Occupational Injuries and Illnesses in the United States, 1980* 30-32 (1982). *See also Baker, et al., Fatal Occupational Injuries,* 248 J. Am. Med. Ass'n 692 (1982) (Maryland study shows that in 1978 more fatalities were caused by road vehicles than by any other cause; half of this category were truck drivers killed in crashes).

Although drivers themselves obviously have a strong interest in reducing this carnage, the general public interest is even stronger. There are some 44 accidents every hour involving large trucks alone. In 1981, this produced 5,779 fatalities, of which only 1,131 were occupants of the truck (mostly drivers). Eicher, Robertson, and Toth, *Large-Truck Accident Causation,* xi I-1 (NHTSA 1982). Indeed, Congress noted that when an accident involves both trucks and cars, 97% of the deaths occur to occupants of cars. 126 Cong. Rec. S1652 (daily ed., February 20, 1980).

Despite the heavy costs when accidents occur, trucking companies have strong incentives to send unsafe trucks on the road, and to coerce truckers to drive them. First, the maintenance and repair of tractors and trailers are expensive. Moreover, when trucks are out of service, the company is not only losing profits that could be made on the use of these assets, but also paying the drivers to wait for their vehicles to be returned to proper condition. Particularly in light of the intense competition fostered by the deregulation of the trucking industry, these economic factors encourage companies to pressure drivers to operate marginally safe vehicles. *See* 1980 Safety Hearing, at 785-86 n.2 (trucking company safety supervisor quoted in *Cincinnati Enquirer* as saying his company "is not in the maintenance business. It is in the trucking business."); Baker, *Safety Implications of Structural Changes in the U.S. Motor Carrier Industry: A Discussion Paper* 17 (AAA Foundation for Traffic Safety, 1985) (given cash shortage, companies are deferring both maintenance and purchase of new trucks, leading to aging fleet with more safety problems).

[2]The fatality figures involve all forms of mining and mineral extraction, and all forms of transportation and utilities. Coal mining and trucking comprise the most dangerous portion of each category.

Congress also found that the existing system of safety enforcement was completely inadequate. The government could file civil suits only for record-keeping violations; safety regulations had to be enforced through the criminal law, which covered only "knowing and willful" violations. However, the Justice Department was unwilling to become involved in such matters, which it regarded as "traffic court" cases. As a result, enforcement actions were rarely brought. 1978 Safety Hearing, at 133.

Moreover, the task was too large for the limited resources available. With some three million heavy trucks, and a million professional drivers, one or two hundred federal safety inspectors cannot possibly examine enough vehicles, frequently enough, to discover or deter safety violations. 1979 Safety Hearings, at 68, 161; Senate Committee Report No. 96-547, 96th Cong., 1st Sess. 3-4 (1979). The drivers themselves were considered to be in the best position to stop violations by refusing to take unsafe vehicles on the road; but, as employees, they were subject to strong pressures to ignore violations. Moreover, there

was inadequate legal protection against discharge for reporting them or for refusing unsafe work. Employee representatives, however, assured Congress that workers would prefer not to use unsafe equipment, if they could be sure that their jobs would be protected by a swift and sure remedy. 1980 Safety Hearing, at 47, 69-70. The whistleblower provisions ultimately adopted as section 405 were thus intended to recruit the drivers themselves for the enforcement of Federal safety standards. 1978 Safety Hearing, at 135; Senate Committee Report at 4; 126 Cong. Rec. S1654 (daily ed., February 20, 1980).

But Congress also decided that, in order to enlist drivers to help enforce federal safety standards, it would not be sufficient merely to provide a procedure to enable workers to obtain reinstatement after years of litigation. Rather, it determined that only an unusually expeditious remedy could provide sufficient reassurances to induce workers to put their jobs on the line. It was aware that an employer may well decide that it is economically rational to fire employees who exercise their statutory rights as a deterrent to other workers' exercise of their rights, even if it eventually has to provide reinstatement with back pay (less the worker's interim earnings) years later, following lengthy administrative procedures and judicial reviews. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1793 (1983). Moreover, while they are awaiting reinstatement, workers may find their economic positions and their marriages dissolving, as they default on mortgages or auto loans, are unable to support their families, and incur other losses which are not compensated by eventual reinstatement, back pay, or even damages. If workers believe that they must pay a substantial penalty for exercising their rights, offset only by a possible reinstatement with

back pay years later, they will be much less likely to take the risk of helping to enforce the federal truck safety rules. 1980 Safety Hearing, at 35. Indeed, as one local union officer bluntly told Congress, immediate implementation of reinstatement is essential because "that is the only way you will have people stand up to [their companies]." *Id.* at 47.

Moreover, studies have shown that reinstatement is effective only if it is offered within a short period following the discharge. Weiler, *supra,* 96 Harv. L. Rev. at 1791-93. As time passes, workers are less likely to accept an offer of reinstatement, *The Aspin Study: A Summary of the Findings, reprinted in* Atleson, *et al., Collective Bargaining in Private Employment* 313-316 (1978), and even those who return to their positions are less likely to last for more than a year or so. Chaney, *The Reinstatement Remedy Revisited,* 32 Lab. L.J. 357 (1981). Thus, the employer who is able to delay reinstatement for a substantial period of time can effectively communicate to the rest of its workers that they would be ill-advised to assert their rights under section 405. In consequence, Congress stressed the importance of an expeditious remedy, maintaining whistleblowers' positions on the job pending the administrative hearing, in order to stop employers from violating truck safety rules. S. Report No. 96-547, *supra,* at 6, 18.

As enacted, section 405 had the approval not only of employee groups but also of the trucking companies. 126 Cong. Rec. S1653 (daily ed., February 20, 1980). It provided an administrative remedy in the Labor Department for employees who were discharged for refusing unsafe trucks or reporting violations. Section 405(c)(1). The Secretary is required to investigate and report his findings within 60 days. Section 405(c)(2)(A). If he finds that there is "reasonable cause" to believe the discharge was retaliatory, he must order reinstatement, back pay, and other

compensatory damages, *id.;* if the worker is not reinstated, the Secretary must seek an injunction in district court. Section 405(e).[3]

If the employer does not file objections to the reinstatement order, it becomes final without the availability of judicial review. Section 405(c)(2)(A). If the employer does file objections, it is entitled to a prompt hearing, but the reinstatement is not stayed pending the hearing. *Id.* Finally, the employer may petition the court of appeals for review of the order issued following the administrative hearing. Section 405(d)(1).

Thus, Congress' response was to create an administrative mechanism, with officials of the Labor Department conducting the necessary investigation and trying the case if it goes to a hearing. The investigation was to be completed within sixty days so that employees who appear to have lost their jobs for refusing to drive unsafe trucks can obtain reinstatement before it is too late, or too expensive, or both.

B. The Right to Prelimiary Reinstatement Is Not Affected by the Union Grievance Procedure.

Both the district court opinions and the employer's motion to affirm placed considerable reliance on the fact that the company had obtained a ruling under the contractual grievance procedure that the discharge in this case did not

[3]If the Secretary does not find such reasonable cause to believe that a violation has occurred, the affected employee may obtain an administrative hearing on his complaint, although presumably he is not entitled to reinstatement unless and until the Administrative Law Judge rules in his favor. Section 405(c)(2)(A).

violate the safety clauses in the collective bargaining agreement. They argue both that the Secretary's preliminary order of reinstatement would itself violate the contract and upset the "arbitration" decision, Pet. App. 7a; Motion to Affirm, at 8 n.6, and that the grievance procedure provides more due process than the Secretary's investigation because both sides (*i.e.*, the union and the employer) have an equal opportunity to litigate. Pet. App. 16a. As we now demonstrate, neither argument is correct, and indeed acceptance of this view would be contrary to Congress' determination that pre-existing remedies for retaliatory discharges were inadequate.

First, as the district court apparently recognized, Pet. App. 16a, the decisions of this Court do not permit union grievance and arbitration procedures under the collective bargaining agreement to bar subsequent litigation of employee rights under worker-protection statutes. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Barrentine v. Arkansas-Best Freight Systm.*, 450 U.S. 728 (1981); *McDonald v. City of West Branch,* 466 U.S. 124 (1984); *Chicago Teachers Union v. Hudson,* 106 S. Ct. 1066, 1077 n.21 (1986). The reasoning of those cases fully applies here. As in those cases, Congress intended that individual workers would be able to file complaints under section 405 and obtain a hearing on their claims of retaliatory discharge, without regard to prior arbitration proceedings under a collective bargaining agreement. Although the statutes involved in those cases provide a right to sue in district court, there is no reason why the statutory right under section 405 to proceed before an administrative agency should be treated differently.

Another reason given in those cases for allowing the statutory proceeding to go forward is that the worker does not have the right to direct the presentation of his own

case in the grievance proceeding, but must accept whatever representation and whatever strategic choices the union chooses. That rationale is also fully applicable here. Additionally, those cases refuse to allow a prior grievance decision to control the outcome of the statutory claim because union grievance procedures are inadequate to resolve the statutory questions, even though the parties have agreed to use them to resolve contractual questions. Again, that rationale fully applies to federal claims that the worker was fired for filing a safety complaint, section 405(a), or for a refusal to work which was reasonably founded on a belief that federal safety rules were being violated or that public safety was endangered. Section 405(b).

Congress was advised of the existence of contractual grievance procedures in the interstate trucking industry, which has been highly unionized, mostly under Teamster contracts. But workers and their representatives complained that these procedures provided inadequate protection for the right to refuse unsafe work, 1978 Safety Hearing, at 135; 1980 Current Conditions Hearings, at 782-783; 1980 Safety Hearing, at 35-36, while the associations of trucking employers argued that union grievance procedures provided sufficient protection that a statute was unnecessary. 1978 Safety Hearing, at 106; 1979 Safety Hearings, at 133. Congress' decision to enact section 405 in the face of these sharply contrasting arguments surely represents a decision that contractual procedures were not an adequate substitute for rights and procedures under public law. Indeed, immediately preceding passage of the Act, a colloquy between Senators Percy and Danforth clarified Congress' intent that the remedy under section 405 was to be in addition to any pre-existing remedies, such as under union contracts. 128 Cong. Rec. S15611 (daily ed., December 19, 1982). Therefore, if the employer

must respond in an administrative proceeding after winning the contractual one, that is simply a consequence of the fact that Congress has chosen to provide this additional right.

There is another reason, applicable principally to Teamster contracts, why the prior grievance proceeding here is of no significance to the statutory claim. Most union contracts require a series of meetings between employer and union leaders, at increasingly higher levels (usually called "steps"), at which attempts are made to resolve the grievance informally; if no agreement can be reached at the highest level of informal meeting, then the union has to decide whether to invoke arbitration before a neutral person selected by both sides. Elkouri & Elkouri, *How Arbitration Works* 165-166 (4th ed. 1985). Under the Teamster procedure, by contrast, both the successive steps and the arbitration are replaced by "joint grievance committees," composed of an equal number of management and union representatives. In these circumstances, whenever an employee's grievance is "denied," it is because at least one union representative has voted with management. If the committee deadlocks, the grievance is referred to the next higher level. And if the National Grievance Committee deadlocks, the procedure culminates, not in arbitration by a neutral, but in the right of the union to strike to enforce its views, a right which is very seldom invoked. Consequently, the joint committee is most closely analogous, not to an adjudicatory body which applies contractual rights to particular facts, but rather to a sytem of on-going negotiations which forces the parties to reach an agreement about how they would like to have each particular case handled. *See* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663, 837 (1973).

Moreover, the procedure followed by the joint committees does not inspire confidence in its fairness or in the accuracy of its decisions. As detailed by Professor Summers, *Teamster Joint Grievance Committees: Grievance Disposal Without Adjudication,* 37 Proceedings of the National Academy of Arbitrators 130 (1984), and by Professors Azoff and James before him, Azoff, *Joint Committees as an Alternative Form of Arbitration Under the NLRA,* 47 Tul. L. Rev. 325 (1973); James & James, *Hoffa and the Teamsters: A Study in Union Power* 167-185 (1965), *ex parte* contacts between the parties and the committee members are the "expected norm." Azoff, 47 Tul L. Rev. at 361. Thus, the union representatives who serve as advocates at the committee hearings can tell the union representatives who sit in judgment which grievances they really want to win, and inferentially which they are willing to see traded off. "Hearings" normally consist of each side making a statement of its position, with little or no testimoy or cross-examination, which permits a grievance committee to consider up to 30 cases in a single day, at a rate of 15 minutes per case. Summers, 37 NAA Proceedings at 134-138.[4] The committee decisions are usually stated in a single word, "denied" or "sustained," and include no rationale, so that it is easy to engage in horse-trading without any accountability. And, in fact, the union leadership does use the joint committee process to punish its enemies and reward its friends, all with the pretense of a fair hearing. *E.g.,* James & James, *supra;* Azoff, 47 Tul L. Rev. at 328-329; Summers, NAA Proceedings at 140-143.

[4]If a grievant insists upon presenting witnesses, or upon testifying himself, TDU has found that he will often be permitted to do so. Unfortunately, the real message which is presented by such a departure from normal procedure may be that the grievant does not trust the union to represent him, and that the union would probably not object to losing the grievance.

There is nothing intrinsically improper about this procedure as a means of resolving disputes under a contract, because a union must be free to sift out grievances which are frivolous, as well as to decide which individual or group claims are not deemed worth the expenditure of collective resources. *Humphrey v. Moore,* 375 U.S. 335, 349 (1964). And insofar as the procedure resolves claims that the contract has been violated, the Court has held that its results are entitled to as much finality between the parties as if the union had dropped the grievance short of arbitration, or gone to arbitration and lost. *General Drivers v. Riss & Co.,* 372 U.S. 517 (1963).[5] But the fact that the parties have decided to use this cheap and summary means for settlement of contract disputes does not entitle the employer either to assert that favorable decisons are a reason to reject employee claims that their statutory rights have been violated or to insist that either the Secretary or the courts give such decisions any weight in their consideration of whether there is reasonable cause to believe that a worker was discharged for refusing to drive an unsafe truck.

C. The Procedure for Preliminary Reinstatement Fully Comports With the Requirements of Due Process.

In deciding whether preliminary reinstatement proceedings under section 405 violate due process, it is first necessary to decide how that section operates in light of Congress' desire to ensure a speedy procedure for obtain-

[5]TDU believes that the decisions of the union representatives on the grievance committee should be open to examination pursuant to the duty of fair representation, much as the decision of a union business agent not to go to arbitration may be reviewed in a proper case. That issue, however, is not presented in this case.

ing reinstatement and the need for fairness to the employer who is subject to a reinstatement order. And in doing so, the Court should recognize that experience under other regulatory schemes providing for reinstatement of workers, such as the National Labor Relations Act, indicates that employers will not roll over and play dead when ordered to provide reinstatement. Rather, as discussed *supra* at 8-9, they will seek every opportunity to retain the coercive advantages which encourage retaliatory discharges in the first place; accordingly, they use every available means to delay the actual reinstatement as long as possible. The Secretary's construction of the statute is apparently based on his belief that employers will resist reinstatement to the hilt, and TDU's experience fully supports that belief.

The Secretary's solution to the problem of employer recalcitrance is to accept the district court's characterization of his investigation as a quasi-judicial determination of the basis for the discharge, although he then argues that the fairness of his investigatory procedure meets the standards of due process. He also construes section 405 so that, once an order is entered, it will be automatically enforced by the district court pursuant to section 405(e), without any review of the basis for the order. He believes that, even if he is ultimately required to conduct an evidentiary hearing and compile an informal record on which his quasi-adjudication will be based, he will still be entitled to automatic enforcement under section 405(e). The standard of automatic enforcement, in which the only question is whether the employer has complied with the order, would plainly have the effect of discouraging employer noncompliance, but it would require the due process charge to be defended solely on the basis of the Secretary's investigation.

Under this approach, the Secretary argues that his investigation satisfies the three-factor test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). His papers seek to apply or distinguish a series of cases in which this Court has enumerated the due process requirements which apply to such government actions as the termination of welfare benefits, *e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970); the revocation of a license, *e.g.*, *Barry v. Barchi*, 443 U.S. 55 (1979); *Dixon v. Love*, 431 U.S. 105 (1977); discharge from government employment, *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487 (1985), or removal from public school. *Goss v. Lopez*, 419 U.S. 565 (1975).

However, the Secretary's preliminary orders under section 405 are fundamentally different from each of these government actions in one sense that makes the cases debated by the parties largely irrelevant. Thus, the discharge of a government employee or the revocation of a license is a self-executing act; the administrative decision itself deprives the private party of a valuable right or benefit. Under section 405, by contrast, the Secretary's preliminary order has no direct effect by itself; if the employer thumbs his nose at the Secretary, the Secretary must go to court in order to seek preliminary reinstatement for the discharged worker. But under the Secretary's view of section 405, the court would simply rubber stamp the administrative order, and hence in that sense his administrative ruling would be the functional equivalent of a self-executing reinstatement order which would have to meet the tests of due process on its own.[6]

---

[6]It makes no difference that this preliminary order becomes final, and immune from judicial review, unless the employer files an objection and requests a hearing. Section 405(c)(2)(A). The due process clause scarcely prohibits the imposition of a minimal burden of requesting a hearing in order to avoid waiver of an evidentiary hearing and to maintain a right to judicial review.

Given TDU's desire to achieve the most expeditious possible reinstatement remedy, the Secretary's position is certainly seductive. We offer an alternative construction of the statute, however, because we do not share the Secretary's confidence that section 405 can be construed in that way and still pass due process muster. Our concern is that, if the Secretary's finding of "reasonable cause" is quasi-adjudicatory, he will not be able both to satisfy due process *and* to avoid judicial review under Administrative Procedure Act standards in a section 405(e) action. Indeed, although Congress has provided that orders which could have been reviewed under section 405 (*i.e.*, in the court of appeals) may not otherwise be reviewed in any other proceeding (such as in district court), section 405(d)(2), and that preliminary orders are not subject to judicial review if the employer files no objections, section 405(c)(2)(A), there is no express provision either permitting or precluding review of preliminary reinstatement orders when there are objections filed. Accordingly, we entertain serious doubts that the Court would decide, as a matter of statutory construction, that there is "clear and convincing evidence" that Congress intended to deny any judicial review of the basis for the preliminary order. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-141 (1967).

But if the Secretary must conduct an evidentiary hearing, however informal, in order to satisfy due process standards, or if his preliminary order is subject to judicial review under the Administrative Procedure Act — or, indeed, if both a hearing and judicial review were required — the quick and efficacious remedy desired by Congress would be lost. Thus, TDU suggests an alternate construction of the statute, pursuant to which the Secretary's investigation and findings under section 405(c)(2)(A) are unreviewable because they are simply a prosecutorial decision to institute a preliminary injunction action under section 405(e). In that event, it is in the courts that the employer would receive the process that is due.

Under this analysis of the statute, the only due process issue would be whether failure to grant employers a full evidentiary hearing in the course of the judicial preliminary injunction proceeding is unconstitutional under these circumstances. In our view, it was entirely proper for Congress to decide that an employer which seeks to discharge an individual who has made a safety complaint must maintain the pre-discharge status quo pending a prompt administrative hearing, once a neutral government official has concluded, after an investigation, that there is reasonable cause to believe that the worker was discharged because of the safety protest and some judicial review of the matter is available. *Ewing v. Mytinger & Casselberry,* 339 U.S. 594 (1950); *cf. Fuentes v. Shevin,* 407 U.S. 67, 93 (1972).

Nor is there any novelty in a regulatory scheme which forbids business or other commercial interests from exercising their economic power to the disadvantage of individuals, pending an administrative hearing to determine whether the individuals' rights have been violated. Thus, in many states, landlords may not use self-help to evict tenants who, they believe, have violated the lease or overstayed their terms; rather, they must seek a judicial hearing first to determine whether the tenants are entitled to remain. *Restatement (Second) of Property* § 14.2 (1977); Uniform Residential Landlord & Tenant Act, § 4.207. Similarly, many states deny a secured creditor the right to repossess property over a debtor's objection, even if the debtor has defaulted on the loan, pending an expedited proceeding to determine whether there has been a default warranting forfeiture of the property. White and

Summers, *Handbook of the Law of the Uniform Commercial Code* § 26-6 (2d ed. 1980). And Congress has permitted the federal government to keep goods off the market by seizing them, pending completion of proceedings to determine whether the public is in fact endangered or misled by their labeling. *See Ewing v. Mytinger & Casselberry, supra.* By the same token, in section 405, Congress limited the right of trucking employers to use economic self-help by firing employees pending an administrative hearing, at least where the Secretary of Labor has determined, after an extensive investigation, that there is reasonable cause to believe that the discharge was motivated by the worker's exercise of his rights and there is a limited right to defend in court. This legislative scheme is no more offensive to due process than the procedures for resolving landlord-tenant, debtor-creditor, or food and drug disputes.

The remaining question is, what standard the district courts should apply when deciding whether to grant the preliminary injunction requiring reinstatement, pending the administrative hearing on any timely objection to reinstatement. The statute does not specify any standard, but we submit that Congress' objective of providing a quick and effective remedy would best be served by borrowing the standard applied by the district courts in the analogous situation under the National Labor Relations Act. Thus, when the NLRB's General Counsel finds reasonable cause to believe that an unfair labor practice has been committed, she may seek a temporary injunction under section 10(j) if she concludes that the remedies available from the Board after a full hearing will not adequately redress the harms caused by the unfair practice. If the violation involves certain forms of secondary boycott or recognitional picketing, section 10(l), not section 10(j), applies.

In considering such requests for preliminary relief, the courts neither inquire into the process by which the General Counsel carried out her investigation, nor conduct a *de novo* examination of the facts of the case. Rather, if there are disputed issues of fact, they defer to the General Counsel's version of the facts. Morris, *The Developing Labor Law,* 1640, 1649 (1983). Even disputes about the applicable law are resolved in favor of preliminary relief, unless the General Counsel's legal position is clearly wrong. *Id.* at 1641. Under section 10(l), which, like section 405 in this case, makes it mandatory rather than discretionary to seek preliminary relief, many courts are even more deferential, requiring entry of an injunction unless the General Counsel's theory of violation is "frivolous or insubstantial." *Id.* at 1648-1649.[7]

Adoption of a 10(j) or 10(l) standard in section 405 preliminary order cases would plainly satisfy due process, and still further the congressional purpose of affording employees a quick and effective remedy by discouraging employers from resisting preliminary reinstatement unless the Secretary's preliminary findings were plainly without basis. On the other hand, if employers could obtain a full-fledged administrative trial on the factual and legal grounds for the discharge, or even a detailed judicial review of the evidentiary basis of the Secretary's preliminary findings, they would be encouraged to oppose reinstatement in every case. Not only would such delay de-

[7]The courts have been divided in section 10(j) cases, and to a lesser extent in section 10(l) cases, about whether they have the authority to withhold relief based on their assessment of the balance of the equities. *Id.* at 1641, 1650. That question would not arise in section 405(e) cases, because Congress has determined that, when there is reasonable cause to believe a discharge was retaliatory, the equities and the public interest require preliminary reinstatement.

crease the value of the reinstatement remedy, but it might well make implementation of section 405 unworkable in a large number of cases. By adopting the standard of limited review suggested here, backed up by the penalties imposed for unreasonable defenses under Rule 11 of the Federal Rules of Civil Procedure, the courts would serve the congressional purpose of providing a quick and expeditious remedy, without raising any questions about whether the Secretary's own decision-making procedures violated due process.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Arthur L. Fox II
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for *Amicus Curiae**

July 25, 1986

---

*Counsel wish to acknowledge the assistance of Julie Fosbinder, the General Counsel of TDU, and Andrew Dwyer, a paralegal.